

NTSB Order No. EA-5109

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 8th day of September, 2004

Respondent.

Docket CP-115

Respondent has appealed from the oral initial decision and order of Administrative Law Judge William A. Pope, II, issued on June 3, 2003, after an evidentiary hearing.¹ In that decision and order, the law judge affirmed the Administrator's assessment of a \$2,000 civil penalty against respondent, for violations of

7653

14 *Code of Federal Regulations* (FAR) section 61.3(a).² As further discussed below, we deny respondent's appeal and affirm the Administrator's order of assessment.

The order of assessment alleged the following facts and circumstances:

1. On or about November 19, 2001, you acted as pilot in command of civil aircraft N1687H, a Piper PA-28-161, on a passenger carrying flight from Saint Maarten, Netherland Antilles to Kingston, Jamaica to Fresh Creek, Bahamas, to Fort Lauderdale-Hollywood International Airport (FLL), Fort Lauderdale, FL.
2. Upon arrival at FLL, you instructed your passenger, identified as Gladstone Hastings, to complete the United States Customs Service arrival documents to indicate that he was the pilot in command of the above flight.
3. Subsequent to the above flight, you operated N1687H, as pilot in command, from FLL to Sebastian Municipal Airport (X26), Sebastian, FL to Flagler County Airport (X47), Bunnell, FL.
4. At the time of the above flights, you did not possess a valid airman pilot certificate authorizing you to

² Section 61.3(a) provides, in part:

§ 61.3 Requirement for certificates, ratings, and authorizations.

(a) *Pilot certificate.* A person may not act as pilot in command or in any other capacity as a required pilot flight crewmember of a civil aircraft of U.S. registry, unless that person --

(1) Has a valid pilot certificate or special purpose pilot authorization issued under this part in that person's physical possession or readily accessible in the aircraft when exercising the privileges of that pilot certificate or authorization. However, when the aircraft is operated within a foreign country, a current pilot license issued by the country in which the aircraft is operated may be used.

conduct these flights due to the fact that, on or about October 30, 2000, the FAA issued an Emergency Order revoking your private pilot certificate number 002373849.

It is undisputed that respondent made the flights specified in the complaint and that he did not possess a valid pilot certificate at the time of those flights.³ However, respondent contends that another certificated pilot was on board each of those flights and that the other pilot, not he, was the pilot in command of the flights. In the case of the first three flights (from Saint Maarten, Netherland, Antilles to Kingston, Jamaica; from Kingston to Fresh Creek, Bahamas; and from Fresh Creek to Fort Lauderdale, Florida) respondent asserts that the pilot in command was Gladstone Hastings. In the case of the last two flights (from Fort Lauderdale to Sebastian, Florida; and from Sebastian to Bunnell, Florida) respondent asserts that another pilot was on board serving as pilot in command, but has not identified that pilot or offered any explanatory details.

³ Although respondent appears to concede that he did not possess a valid pilot certificate (see Transcript (Tr.) 121, and appeal brief p. 3), he suggests in his appeal brief that the student pilot certificate he was issued on February 13, 2001, was valid, contrary to the Administrator's assertion at the hearing that it was not valid because it was issued before the expiration of the 6-month period of denial set forth in the October 30, 2000 order of revocation. However, the student pilot certificate was clearly not valid in light of the clear provisions in the order of revocation and the regulation addressing re-application after revocation (FAR 61.13(d)(2)). Moreover, we note that even if it was valid, a student pilot may not act as pilot in command of an aircraft carrying a passenger (which respondent asserts he was on all five flights); in furtherance of a business (as were the flights in question); or on international flights (as were the first three flights here at issue). See FAR 61.89(a).

At the hearing, the Administrator presented testimony from FAA special agent Richard Buczek that Mr. Hastings told him he was simply a passenger on the flights he took with respondent (from Kingston, Jamaica to Fresh Creek, Bahamas; and from Fresh Creek to Fort Lauderdale, Florida), and that respondent operated the airplane as pilot in command.⁴ Mr. Hastings further told Agent Buczek that, upon arrival in Fort Lauderdale, respondent asked him to falsely indicate on U.S. Customs Service forms that he (Mr. Hastings) had been the pilot in command of the entire three-leg flight sequence from Saint Maarten to Fort Lauderdale, which Mr. Hastings then did.

Regarding the last two flights (from Fort Lauderdale to Sebastian, Florida; and Sebastian to Bunnell, Florida), the Administrator proffered testimony from Mr. Brian Barry that he arranged to have respondent's employer, Command Aircraft of Bunnell, Florida (the owner of N1687H), fly the airplane to his business in Sebastian because he was thinking of buying it. Mr. Barry testified that the airplane was already there when he arrived at the airport on November 19, 2001, in respondent's custody, and that respondent showed him the airplane. Mr. Barry decided not to buy the airplane and went into his office to call respondent's employer and inform him of this decision. While he was in his office, Mr. Barry heard the airplane take off and depart the airport. Although Mr. Barry did not actually see

⁴ Agent Buczek testified that Mr. Hastings told him that he was looking for transportation from Jamaica to Florida, and respondent had "offered him a ride." (Tr. 76.)

respondent piloting the airplane on its arrival or departure, he indicated that respondent was the only pilot at the airport at the time, other than his own employees.

The law judge credited Agent Buzcek's testimony and discredited respondent's testimony. He noted that respondent provided no detail about what if any flying duties Mr. Hastings performed as the purported pilot in command of the first three flights and that respondent did not identify who he was claiming had been the pilot in command of the last two flights. The law judge concluded that the Administrator had proven by a preponderance of the evidence that respondent was the pilot in command of all five flights cited in the complaint, and affirmed the order of assessment in its entirety.

On appeal, respondent continues to maintain that Mr. Hastings was the pilot in command of the first three flights, and claims that agent Buzcek's testimony that Mr. Hastings told him respondent was the pilot in command was inaccurate and also constitutes hearsay that does not fall into the exception cited by the Administrator at the hearing.⁵ Respondent also questions the Administrator's position that Mr. Hastings was unavailable to provide live testimony, and suggests that the Administrator could have prevailed upon him to testify. We reject these challenges.

⁵ The Administrator cited exception 804(b)(3) to the Federal Rules of Evidence rule against hearsay (statement against interest of an unavailable witness) because by admitting that he allowed respondent to convince him to lie on the U.S. Customs Service forms Mr. Hastings was admitting to a felony under 18 U.S.C. 1001. Respondent counters that Mr. Hastings likely did not know that such conduct constituted a felony.

When a pilot does not hold a license, the mere presence of a certificated pilot on board a flight "does not make the other person the pilot-in-command. Rather, the pilot-in-command is the individual who has overall responsibility for, and control of, a flight." Administrator v. McCartney, 3 NTSB 925 (1983), cited in, Administrator v. Cooper, NTSB Order No. EA-4433 (1996). All of the evidence indicates that respondent, on behalf of his employer, had overall responsibility for and was in control of these flights. Although he asserts that another pilot was on board each of those flights, he admits that he operated the controls of the aircraft on at least the first three flights, and offered nothing to indicate that anyone other than he had responsibility or control. Further, regarding the admissibility of Mr. Hastings' account via Agent Buzcek's testimony, we note that hearsay evidence is admissible under our rules (49 C.F.R. 821.38) and therefore no exception to the hearsay rule need be proven.⁶ Finally, we note that respondent could have, but did not, proffer a statement from Mr. Hastings to contradict what Agent Buczek testified to.

Regarding the last two flights, respondent again maintains that he was not the pilot in command. However, he still does not identify who he contends was the pilot in command, other than to assert, "I had another pilot with me and ... I was consciously

⁶ Accordingly, we take no position on whether Mr. Hastings' statement to Agent Buczek would qualify as a statement against interest if the hearsay provisions in the Federal Rules of Evidence did apply.

keeping him at the snack bar⁷ -- out of sight -- for his own good and to protect his pilot's certificate from Mr. Buczek." (Appeal brief, at 3.) However, this assertion, even assuming it is true, does not resolve the issue of responsibility and control over the flight. Nor do we think it strong enough to overcome the Administrator's evidence, through the testimony of Mr. Barry, that respondent was likely the only pilot on board those flights.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The Administrator's order of assessment and the law judge's initial decision are affirmed.

ENGLEMAN CONNERS, Chairman, ROSENKER, Vice Chairman, and CARMODY, HEALING, and HERSMAN, Members of the Board, concurred in the above opinion and order.

⁷ In his cross-examination of Mr. Barry, respondent asked him to confirm the existence of a snack bar in a neighboring business, and alluded to the possibility that he "had a friend in that snack bar." However, Mr. Barry testified that he did not see respondent enter the snack bar and he did not see anybody with respondent. (Tr. 111, 114.)